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Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 1/2018 concerning Pedro Zaragoza Fuentes and Pedro Zaragoza Delgado (Mexico)*

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 9 January 2018, the Working Group transmitted to the Government of Mexico a communication concerning Pedro Zaragoza Fuentes and Pedro Zaragoza Delgado. The Government replied to the communication on 12 March 2018. The State is a Party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

* In accordance with paragraph 5 of the Working Group's methods of work, José Antonio Guevara Bermúdez did not participate in the discussion of the present case.

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(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Pedro Zaragoza Fuentes and Pedro Zaragoza Delgado, father and son, are Mexican nationals, businessmen from the State of Chihuahua. They are partners in companies in which other members of their family are shareholders.

5. The source reports that a partner and relative of Mr. Zaragoza Fuentes and Mr. Zaragoza Delgado carried out a series of manoeuvres in an allegedly illegal attempt to take over a number of the business group's companies and subsidiary businesses. It is claimed that he used the criminal complaints process to push for economic gain, taking advantage of a practice provided for in the Constitution of Mexico — namely, the automatic use of pretrial detention for certain types of offence.

6. Father and son were accused of offences that, despite allegedly false and, in some aspects, non-existent evidence, were sufficiently serious to justify an order for automatic pretrial detention, as authorized under the Constitution and procedural law. A warrant for the arrest of the two men was thus issued and Mr. Zaragoza Delgado was placed in automatic pretrial detention, having been denied the opportunity, in accordance with article 20 of the former Constitution (article 19 of the current Constitution), of requesting a non-custodial alternative.

7. According to the source, the complaint of extortion was lodged with the Office of the State Attorney General of Sinaloa by the partner and relative of Mr. Zaragoza Fuentes and Mr. Zaragoza Delgado on 23 October 2015. On 14 December 2015, the complaint resulted in the issue of an arrest warrant by the Sixth Court of First Instance for Criminal Offences. The issue of the warrant, in turn, set the criminal proceedings in motion.

8. The source reports that the warrant for the arrest of Mr. Zaragoza Delgado was executed on 20 January 2016, and that he was arrested without having received prior notification of the criminal proceedings. A false address, in a place that was not his home, was used to issue the warrant, since he did not live in Sinaloa. At the time of his arrest, he was neither informed of the charges against him nor read or explained his rights under article 20 of the Constitution. He also had no opportunity to challenge his detention, as he was not brought before a judicial authority within 48 hours, as required by the Constitution.

9. The source contends that Mr. Zaragoza Delgado was subjected to cruel and inhuman treatment while being transported by land and by air from the Federal District — now Mexico City — to the State of Sinaloa, as he was handcuffed for more than 12 hours and held in isolation, unable to communicate with his family or lawyers.

10. According to the source, Mr. Zaragoza Delgado was detained for 56 days. The pretrial detention order had been issued automatically and he did not have the option of petitioning for a non-custodial alternative, as such alternatives were prohibited under the Constitution in cases like his. In the source's view, this prohibition is discriminatory, since it creates different classes of suspects: namely, suspects who may benefit from alternatives to pretrial detention and suspects who may not.

11. The source indicates that, since an arrest warrant had been issued against him for the same offences for which his son had been arrested, to avoid the looming prospect of being detained arbitrarily, Mr. Zaragoza Fuentes had no choice but to live — as he still lives — as a fugitive. The warrant was active for several months and is currently being contested, meaning that it could be reactivated at any time.

12. As a result of his son's arrest, Mr. Zaragoza Fuentes has himself been living in fear of the warrant's execution. According to the source, the entire criminal process has been manipulated and controlled, being used as a means of extortion to force Mr. Zaragoza

Fuentes into signing a financial agreement concerning the jointly owned companies with the relative who reported him in exchange for the release of his son and an end to the threat to his own freedom.

13. The source indicates that, although both arrest warrants were revoked after it was proven that the information and evidence on which they were based was false, the complainant and the Office of the State Attorney General have challenged the revocation. Thus, once this challenge is settled, the warrants could be used to justify his re-arrest. This threat of detention, it is argued, implies a potential infringement of liberty.

14. A core component of the source's claim is that, for certain offences, pretrial detention is the general rule rather than an exception, pursuant to article 19 of the Constitution. The automatic use of pretrial detention, as provided for in article 20 of the previous Constitution, which was in force at the time of the events, is still permitted, only now in article 19. This provision, according to the source, represents a constant threat to liberty of person in Mexico, as it permits arbitrary detention on a general basis. Such a threat, the source argues, is currently looming over Mr. Zaragoza Fuentes and his son, in addition to the detention which the latter has already endured.

15. According to the source, the constitutional framework stipulating automatic pretrial detention for persons accused of certain crimes turns the presumption of innocence, which is a basic safeguard in all criminal proceedings, into a presumption of guilt, as no consideration is given to the evidence or the possibility of alternatives to automatic detention. The criminal court responsible for the proceedings is prevented from analysing or otherwise considering the circumstances of the case.

16. The source notes that article 20 of the Constitution in force at the time of the events, which corresponds to article 19 of the current Constitution, prevents judges conducting criminal proceedings for certain offences from ruling on whether or not to release the defendants. Judges are under an obligation to deny alternatives to pretrial detention and, as a result, are forced to violate article 9 (3) of the Covenant, since the aforementioned constitutional provisions do not give them the discretion to consider any possibility other than automatic pretrial detention.

17. The source explains that, when a person is accused or apprehended, the judge hearing the case should explore all options before taking a decision as to whether a person's legal situation justifies continued liberty — that is, deciding whether to use non-custodial alternatives to detention to prevent the person from absconding or to allow the person to be tried without being deprived of his or her liberty, where so justified. Depriving judges of this possibility, in the source's view, is a limitation of their judicial powers, giving them no choice but to order pretrial detention.

18. The source contends that, by compelling judges to issue arrest warrants and detention orders on the strength of nothing more than an accusation, the legal framework makes it possible to use arbitrary detention as a means of extortion. This situation has spawned a widespread practice whereby people file false complaints and malicious accusations as a means to trigger arbitrary arrests and, through agreements that lead to the suspension of criminal proceedings, obtain money from the arrested person in exchange for his or her freedom.

19. The source argues that, in this case, a relative and business partner used false evidence to file a criminal complaint with the intention of placing Mr. Zaragoza Fuentes and Mr. Zaragoza Delgado at a disadvantage and forcing them to sign an agreement to redistribute their companies' assets and shares. The criminal complaint was filed in Sinaloa — a state in which such practices are commonplace and the complainant had contacts among senior officials in the Office of the State Attorney General. These officials expedited the issue of the arrest warrants in order to encourage the "negotiation" of a settlement in which a payment would be made to eliminate the threat to Mr. Zaragoza Fuentes' liberty and secure the release of Mr. Zaragoza Delgado, who had been arrested and placed in pretrial detention.

20. The source submits that the present case falls within category I of the Working Group's categories of arbitrary detention, as the legal basis for Mr. Zaragoza Delgado's

detention is incompatible with international standards for liberty of person and the obligation to offer non-custodial alternatives that prevent detention from becoming the rule. In this respect, the source states that the provision of the Constitution is contrary to the international obligation, laid down in article 9 (3) of the Covenant, to ensure that pretrial detention is an exception rather than the general rule.

21. The source also submits that Mr. Zaragoza Delgado's detention was arbitrary under category III of the Working Group's categories of arbitrary detention, as the international norms relating to the right to a fair trial were not observed. The violation of the fundamental right to be presumed innocent, enshrined in article 14 (2) of the Covenant, is also highlighted in the communication; the source argues that detaining Mr. Zaragoza Delgado without proof of his guilt was a breach of the right of all persons charged with a criminal offence to be presumed innocent until proved guilty. The source makes the same argument with regard to the arrest warrants that are being challenged, as they are a constant threat to the liberty of Mr. Zaragoza Fuentes and Mr. Zaragoza Delgado, who have not had a fair trial culminating in a final judgment and conviction.

22. In addition, the source contends that this case also involves detention that is arbitrary under category V. The argument is that father and son are victims of discrimination, as, under the Constitution, given the offence of which they have been accused, they are not entitled to benefit from alternatives to detention. This situation has infringed their right to liberty of person without justification and, according to the source, is a violation of articles 3 and 26 of the Covenant.

Response from the Government

23. On 9 January 2018, the Working Group transmitted the source's arguments to the Government and requested detailed information on the situation of Mr. Zaragoza Fuentes and Mr. Zaragoza Delgado by 12 March 2018. The Working Group also asked the Government to clarify the factual and legal grounds for the detention of Mr. Zaragoza Delgado and to explain how his detention was compatible with the country's human rights obligations. The Government replied to the communication on 12 March 2018.

24. The Government confirmed that, on 23 October 2015, Mr. Zaragoza Fuentes' and Mr. Zaragoza Delgado's relative and business partner filed a complaint accusing them of extortion and that an investigation that involved the collection of evidence was initiated as a result. The Public Prosecution Service instituted criminal proceedings against Mr. Zaragoza Fuentes and Mr. Zaragoza Delgado on 8 December 2015. The arrest warrants were issued on 14 December 2015. The warrant for the arrest of Mr. Zaragoza Delgado was executed on 20 January 2016.

25. The Government reports that the Mr. Zaragoza Delgado was transferred to Sinaloa, where the criminal proceedings against him were pending, and that he was placed in the Centre for the Enforcement of the Legal Consequences of Crime on 21 January 2016. He gave his initial statement on the same day, with the assistance of his lawyers. The defence team requested that the time period for the submission of evidence be doubled so, instead of having 72 hours, they were given 144 hours to collect and submit the evidence they considered relevant. On 26 January 2016, once the evidence had been submitted, Mr. Zaragoza Delgado was committed to custody. Indirect *amparo* proceedings were instituted to challenge the detention order.

26. The Government points out that, on 8 March 2016, Mr. Zaragoza Delgado filed a motion for release on grounds that the evidence against him was inadequate, and that his immediate release was ordered on 14 March 2016. The *amparo* proceedings were dismissed as a result, having been rendered without purpose. On 16 March 2016, Mr. Zaragoza Delgado's release due to insufficient evidence was challenged by the Public Prosecution Service. For the time being this challenge remains pending because of a change of judge.

27. Mr. Zaragoza Fuentes, for his part, filed an *amparo* petition before the warrant for his arrest was executed. This action concluded favourably. Mr. Zaragoza Fuentes made an appearance to make his statement and submit the evidence he considered relevant. Ultimately, for want of incriminating evidence, Mr. Zaragoza Fuentes was released. The release order was challenged by the Public Prosecution Service and the alleged victim's

lawyer. While the challenge to the order for Mr. Zaragoza Delgado's release is pending, the order for Mr. Zaragoza Fuentes' release has been confirmed without being contested by any of the parties.

28. The Government states that Mr. Zaragoza Delgado never complained to the authorities that he had been subjected to cruel and inhuman treatment or held incommunicado during his detention. Accordingly, the Government, not being apprised of the allegations to that effect, had no reason to undertake the relevant investigations. According to the Government, Mr. Zaragoza Delgado's failure to submit a complaint suggests that the allegations are untrue. The Government contends that at no time — either when he was arrested or while he was in detention — was Mr. Zaragoza Delgado subjected to cruel and inhuman treatment. On admission to the detention facility, he underwent a medical examination that found no signs of injury and he did not report that he had been subjected to cruel and inhuman treatment.

29. The Government notes that, despite the assertion to the contrary, the detention of Mr. Zaragoza Delgado was lawful under the applicable legislation. Under article 21 of the Constitution of Mexico, the Public Prosecution Service and the police have the power and the obligation to investigate any reported crime. In addition, article 16 of the Constitution states that arrest warrants may be issued only by a judicial authority and only after a criminal complaint has been submitted.

30. Mr. Zaragoza Delgado's detention was the result of the extortion complaint against him, which was backed up by evidence gathered during the investigation, including evidence sufficient to assume his probable criminal liability for the offence of extortion, as defined in article 231 of the Criminal Code of Sinaloa. The arrest of Mr. Zaragoza Delgado was thus based on an arrest warrant issued by the judicial authority. Since extortion is considered a serious crime, Mr. Zaragoza Delgado had to face trial while deprived of his liberty, as required by the Constitution.

31. Mr. Zaragoza Delgado was kept informed at all times of the charges against him. He was allowed an adequate defence, as shown by the appeals and *amparo* petitions he filed, not to mention the motion for release which put an end to his detention. Consequently, since the detention was ordered by the competent authority, with a court order and in accordance with the applicable Criminal Code, it was legal under Mexican law.

32. The Government explains that the detention was necessary and proportionate. Detaining Mr. Zaragoza Delgado was necessary because he was facing trial for extortion, which is considered by law a serious crime. Under article 18 of the Constitution, pretrial detention should be ordered in cases involving offences punishable by custodial sentences. Under article 117 of the Sinaloa Code of Criminal Procedure and in connection with article 231 of the Sinaloa Criminal Code, extortion is regarded as a serious crime, so, pursuant to article 18 of the Constitution, pretrial detention was ordered.

33. From the outset of his detention, Mr. Zaragoza Delgado was informed of the charges against him and of his right to an adequate defence; indeed, he appointed lawyers of his own choosing and challenged the orders concerning him, submitted exculpatory evidence and even filed a motion for release. The proceedings involving Mr. Zaragoza Delgado were conducted within the time periods required by law. After being arrested, for example, he was immediately transferred to Sinaloa, where, on the following day, his initial statement was taken.

34. Under article 18 of the Constitution, the place in which persons are detained while awaiting trial should be different from that in which they serve their sentences. Mr. Zaragoza Delgado was held in the Centre for the Enforcement of the Legal Consequences of Crime in a section reserved specifically for persons facing trial, and thus separately from convicted prisoners. Furthermore, he was also placed in a cell that was in good condition, in line with international standards.

35. In addition, the Government notes that his arrest was reviewed by the courts without delay. Immediately after he was arrested, and with the assistance of his lawyers, he gave an initial statement to the judge hearing the case. All proceedings could be reviewed without delay by the competent judicial authority. Excluding the time necessary to transfer Mr.

Zaragoza Delgado to Sinaloa, the time elapsed from his arrest to his appearance before a judge amounted to less than one day.

36. Mr. Zaragoza Fuentes and Mr. Zaragoza Delgado also had access to a fair hearing. They were able to submit the evidence and lodge the appeals they considered relevant. In addition, both the Public Prosecution Service and the judge hearing the case acted with due diligence and dispatch throughout the proceedings. The appeals filed by Mr. Zaragoza Fuentes and Mr. Zaragoza Delgado were resolved immediately and in their favour.

37. The Government states that the detention of Mr. Zaragoza Delgado and the warrant for Mr. Zaragoza Fuentes' arrest were not discriminatory, as no distinction, exclusion, restriction or preference redounded to their benefit or caused them harm. There is therefore no indication that there has been any nullification or impairment of the recognition, enjoyment or exercise of human rights.

38. The Government concludes that the detention of Mr. Zaragoza Delgado and the warrant for the arrest of Mr. Zaragoza Fuentes do not constitute arbitrary detention, as neither falls within any of the Working Group's five categories thereof.

Further comments from the source

39. On 13 March 2018, the Working Group transmitted the Government's response to the source for further comments, which were received on 20 March 2018.

40. According to the source, the individual communication is based on a structural problem in the Mexican Constitution and on the use of automatic pretrial detention, in violation of international standards, according to which such detention should be the exception rather than the rule. In its response, however, the Government focuses on the legality of the detention and the arrest warrants, failing to proffer any test of arbitrariness that might show such measures to be necessary, proportionate and reasonable. Mr. Zaragoza Delgado was arrested after a false report, and as a result he spent 56 days in pretrial detention. The fact that he was later released, after it was shown that the accusation was groundless, does not absolve the State of its international responsibility. These incidents have consequences in respect of legality and reparation that have not been acknowledged.

41. The source points out that the Government does not address the argument that a State with a domestic legal framework that allows automatic pretrial detention is in breach of its international obligations. In other words, the Government fails completely to respond to the core argument that, as stated by the Human Rights Committee in its general comment No. 35 on liberty and security of person, "detention in custody of persons awaiting trial shall be the exception rather than the rule" (para. 38). The provisions of article 20 of the Constitution, now article 19, are contrary to international standards and resulted in violations of the rights of Mr. Zaragoza Fuentes and Mr. Zaragoza Delgado.

42. According to the source, the idea that detention is arbitrary cannot be dismissed with a formalistic argument drawn from law. The source rejects the Government's assertion that no rights violation has been committed because the components of criminal proceedings were conducted as required.

43. In cases of deprivation of liberty, the mere existence of a law does not guarantee adherence to the principle of legality. Laws should specify key components and should not refer to vague or overly broad concepts such as public safety. The law applied in this case falls short of that requirement in that it refers to "serious crimes against national security, the free development of the person and public health, as determined by law". It is a collection of vague, ambiguous words that deliberately uses broad and imprecise justifications for automatic detention.

44. The source indicates that judges should be able to consider alternatives, such as bail and electronic bracelets, that would make pretrial detention unnecessary. For fear of breaking the law and being accused of malfeasance, however, and because of a legal and constitutional prohibition, judges cannot consider these alternatives. This restriction undermines the independence of the judiciary.

45. In the source's view, the detention of Mr. Zaragoza Delgado was neither necessary nor proportionate. The Government argued that pretrial detention was necessary because he was facing trial for extortion, an offence considered a serious offence under the law. This extremely generic argument does not demonstrate that detention was necessary. Owing to the generic nature of the provisions, a false accusation of a serious offence was all that was needed for automatic pretrial detention to be ordered. Alternatives to detention, or the possible risk to the proceedings posed by ordering such an alternative, were not considered before detention was ordered. Article 19 of the Constitution, on automatic pretrial detention, is incompatible with international human rights law, as it prevents State agents from fulfilling their obligation to explain, in the light of the principles of necessity, proportionality and minimal intervention, the reasons for any imprisonment orders.

46. According to the source, the Government is wrong to assert that Mr. Zaragoza Fuentes was not arrested because he filed an *amparo* petition. The source contends that it is untrue that the warrant for Mr. Zaragoza Fuentes' arrest was stayed while his petition was heard, as staying arrest warrants in cases of offences warranting automatic pretrial detention is prohibited by Mexican law, in article 166 of the *Amparo* Act to be exact. When a person is deprived of his or her liberty for offences for which pretrial detention is automatic, he or she must await trial in detention and may remain there for years without the trial coming to an end or a verdict being reached. The source stresses that automatic pretrial detention is so deeply entrenched in the local legal system that judges do not see it as a human rights violation. Indeed, in the indirect *amparo* proceedings (77/2016), Mr. Zaragoza Fuentes, starting on 22 January 2016, requested a stay of the arrest warrant to avoid being deprived of his liberty, but the request was denied. The source states that there is a structural problem in Mexico, as there is no expeditious and effective means of challenging human rights violations.

47. According to the source, it is wrong to assume that because no complaint was submitted there was no cruel and inhuman treatment. There is no effective means of defence which would have ensured Mr. Zaragoza Delgado's protection. The General Act on the Prevention, Investigation and Punishment of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment did not enter into force until 26 June 2017. The Government states that no complaint was lodged with the authorities, without specifying with which authorities a complaint could have been lodged. If the State is contending that domestic remedies have not been exhausted, it should not only assert as much, but should also indicate what remedies should have been exhausted and how effective they are. In addition, it is unreasonable to expect Mr. Zaragoza Delgado to have filed a complaint against his captors and jailers no more than a few hours after having been arrested and while his life, liberty and bodily integrity were under threat. Nor could he file a complaint during the 56 days for which he was detained, for fear of threats to his safety.

48. According to the source, there is no effective means of contesting arbitrary detention or determining whether a person was subjected to torture or ill-treatment. While indirect *amparo* proceedings are available, in this case the proceedings were automatically terminated once the judge ruled on the legal situation: there was no opportunity to explore the legality of the detention and the arrest warrant before the proceedings were dismissed. Thus, *amparo* proceedings are not a simple, rapid and effective means of challenging human rights violations.

Discussion

49. The Working Group thanks the source and the Government for their submissions. It appreciates their cooperation and the commitment they have shown throughout the consideration of the case.

50. The Working Group is of the view that the Government's reply confirms some of the source's allegations, including the undisputed fact that a family member of Mr. Zaragoza Fuentes and Mr. Zaragoza Delgado accused them of extortion and that, as a result, on 14 December 2015 warrants were issued for their arrest. Mr. Zaragoza Delgado was arrested on 20 January 2016 and held in the State of Sinaloa. He was placed in automatic pretrial detention on 26 January 2016 and remained in detention until his legal challenge succeeded. He was released on 14 March 2016.

Current situation of Mr. Zaragoza Fuentes and Mr. Zaragoza Delgado

51. The Working Group notes that Mr. Zaragoza Fuentes and Mr. Zaragoza Delgado are not currently deprived of their liberty. Arrest warrants were issued against both men on charges of extortion, but in Mr. Zaragoza Fuentes' case the warrant was not executed and he was not detained. The Government indicates that this is due to the fact that Mr. Zaragoza Fuentes successfully petitioned for *amparo* against the arrest warrant before it was executed. According to the Government, an appeal against the *amparo* order lodged by the Prosecution Service and the plaintiff's counsel was decided in Mr. Zaragoza Fuentes' favour on 31 January 2018. The Government leaves open the possibility that the arrest warrant against Mr. Zaragoza Fuentes could be reactivated; since neither of the two parties have appealed the ruling in his favour of 31 January 2018, the ruling could presumably be challenged in future.

52. The source gives a different account of Mr. Zaragoza Fuentes' situation, indicating that he has been living in hiding under constant threat of being detained like his son, since the arrest warrant against him was issued on the basis of the same false allegations and could be reactivated at any time. The source states that, contrary to the Government's version of events, Mr. Zaragoza Fuentes did not remain at liberty because of the *amparo* action or the suspension of his trial. Pursuant to article 166 of the *Amparo* Act, *amparo* is not available to persons subject to an arrest warrant for offences that require automatic pretrial detention. The source claims that the indirect *amparo* petition against the warrant for Mr. Zaragoza Fuentes' arrest was denied.

53. Notwithstanding the facts in issue, it is clear to the Working Group that Mr. Zaragoza Fuentes remains at risk, as the warrant for his arrest could be reactivated and he could be taken into custody. However, as the Working Group has clarified, its methods of work do not provide a mechanism for addressing situations in which there is sufficient evidence that the execution of an arrest warrant will inevitably result in arbitrary deprivation of liberty. In effect, the Working Group currently has to wait until the arrest warrant is executed and the person is arbitrarily deprived of his or her liberty.[1] Therefore, while it seems likely that Mr. Zaragoza Fuentes could be detained and placed in automatic pretrial detention if the arrest warrant is reactivated, it is not within the Working Group's mandate to address this situation until the arbitrary deprivation of liberty actually occurs. If the arrest warrant is reactivated and the proceedings against him continue, resulting in Mr. Zaragoza Fuentes' detention, the Working Group will have a mandate to offer an opinion as to whether or not the detention is lawful and was carried out in compliance with the relevant provisions of international human rights law. However, in light of the conclusions reached below, the Working Group urges the Government to terminate the proceedings against Mr. Zaragoza Fuentes.

54. Mr. Zaragoza Delgado's situation is different from his father's. Mr. Zaragoza Delgado was deprived of his liberty and placed in automatic pretrial detention for a period of 56 days following the execution of a warrant for his arrest on 20 January 2016. The Working Group notes that, like his father, Mr. Zaragoza Delgado is in danger of being arrested again at any time. According to the Government, the order that led to Mr. Zaragoza Delgado's release on 14 March 2016 was challenged by the Prosecution Service on 16 March 2016 and the appeal is currently stayed because of a change in the judge hearing the case. Given that the appeal was lodged by the Attorney General's Office over two years ago, it seems extraordinary that it has not been resolved, for example, by appointing another judge. This is particularly surprising given that, as the Government has pointed out, the initial investigation, arrest and detention of Mr. Zaragoza Delgado were carried out expeditiously. Given these circumstances, the Working Group urges the Government to terminate the current proceedings against Mr. Zaragoza Delgado without delay and to suspend any further action.

[1] See A/HRC/30/36, paras. 52–56. The Working Group proposed a preventive mechanism in the annual report referred to, but was never given a mandate to implement it either by way of a review of its methods of work or by adoption by the Human Rights Council.

55. The Working Group recognizes that Mr. Zaragoza Delgado is not currently in detention. Pursuant to paragraph 17 (a) of its methods of work, the Working Group reserves the right to render an opinion, on a case-by-case basis, on whether or not the deprivation of liberty was arbitrary, notwithstanding the release of the person concerned. The Working Group believes that it is important to render an opinion, since the case involves allegations that the provisions of the Mexican Constitution fail to comply with international standards inasmuch as they allow for mandatory pretrial detention for certain criminal offences.

Deprivation of liberty under category I

56. In determining whether the deprivation of liberty of Mr. Zaragoza Delgado was arbitrary, the Working Group had regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has established a prima facie case of violations of international standards constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). The Government can meet this burden of proof by producing documentary evidence in support of its claims.[2] Mere assertions that lawful procedures have been followed are not sufficient to rebut the source's allegations (ibid. para. 68).

57. The source alleges multiple violations of Mr. Zaragoza Delgado's procedural rights in the context of his arrest on 20 January 2016. These include the claim that Mr. Zaragoza Delgado was detained without being informed of the charges against him. An allegedly fake address was used to obtain a warrant for his arrest in a place other than his domicile, since he does not live in Sinaloa. He was neither informed of the charges, nor were his rights explained to him at the time of his arrest, as required under article 20 of the Constitution. Moreover, Mr. Zaragoza Delgado was not given the opportunity to challenge his arrest immediately, because he was not brought before a competent judicial authority within 48 hours of his arrest.

58. In its response, the Government stated that Mr. Zaragoza Delgado was informed of the charges against him at the time of his arrest. The Government also pointed out that Mr. Zaragoza Delgado was informed of his right to adequate legal representation and brought before a competent judicial authority the day following his arrest. However, the Government did not provide any evidence substantiating these assertions.

59. In the absence of evidence provided by the Government, the Working Group considers that the source has established a credible prima facie case that violations occurred. Pursuant to article 9 (1) of the Covenant, no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as established by law. In the present case, the authorities failed to comply with the procedures set forth in domestic legislation, including the requirement to explain to Mr. Zaragoza Delgado his rights under Mexican law. Moreover, the authorities apparently failed to inform him of the reasons for his arrest and to provide timely notification of the charges against him, in violation of article 9 (2) of the Covenant.[3] The authorities did not bring Mr. Zaragoza Delgado before a court within the time limit prescribed by domestic legislation, in violation of the rights set

[2] See opinion No. 41/2013 (Libya) which recognizes that the author of a communication and the Government do not always have equal access to the evidence and frequently the State party alone has the relevant information. In this case, the Working Group recalls that "where it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he was entitled, the burden to prove the negative fact asserted by the applicant is on the public authority, because the latter is generally able to 'demonstrate that it has followed the appropriate procedures and applied the guarantees required by law … by producing documentary evidence of the actions that were carried out'" (para. 27). Also see International Court of Justice, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, merits, judgment of 30 November 2010, *I.C.J. Reports 2010*, para. 55.

[3] See opinion No. 23/2017, para. 23, in which the Working Group established that the Mexican authorities failed to give the reasons for arrest immediately at the time of arrest and to provide timely notification of the charges, in violation of article 9 (2) of the Covenant, falling within category I. Also see opinion No. 10/2015, para. 34.

forth in article 9 (3) of the Covenant.[4] The Working Group has established that judicial oversight of the legality of detention is essential to ensure that any deprivation of liberty has a legal basis.[5] The Working Group concludes that the arrest and detention of Mr. Zaragoza Delgado were conducted in violation of domestic due process rules and without a legal basis and that his detention is therefore arbitrary, falling within category I. In addition, as will be discussed below, the Working Group considers that the constitutional provision on which Mr. Zaragoza Delgado's detention was based, namely the provision requiring automatic pretrial detention for certain offences, is contrary to article 9 (3) of the Covenant. This reaffirms the conclusion that he was detained unlawfully.

60. In reaching this conclusion, the Working Group took account of the Government's claim that Mr. Zaragoza Delgado's detention was lawful because his arrest was carried out in accordance with Mexican law. That is to say, Mr. Zaragoza Delgado's arrest was mandated by a competent authority, executed in compliance with a judicial order and based on a criminal offence established in the Criminal Code in force at the time of the events, which qualified extortion as a serious offence requiring automatic pretrial detention. However, as the Working Group has repeatedly stated in its jurisprudence, even when the detention of a person is carried out in conformity with national legislation, the Working Group must ensure that the detention is also consistent with the relevant provisions of international law (see, for example, opinions Nos. 79/2017, 42/2012 and 46/2011).

Deprivation of liberty under category III

61. The source's central argument is based on the fact that mandatory pretrial detention breaches article 9 (3) of the Covenant, which provides that detention while awaiting trial should be an exception, not the rule. According to the source, Mr. Zaragoza Delgado was placed in automatic pretrial detention under a provision of the Constitution (the former article 20) applicable at the time to the offence for which he was charged which required automatic pretrial detention for certain offences, including extortion. According to the source, article 20 provided that in every criminal trial the accused person and the victim or injured party should enjoy the following guarantees: A. The accused person: I. At the request of [the accused], the judge shall immediately grant release on bail, provided that the alleged offence is not of such gravity that the law expressly prohibits this benefit.[6] The source stresses that the mandatory pretrial detention mechanism for certain offences remains in force under article 19 of the Constitution.[7]

62. In its response, the Government stated that Mr. Zaragoza Delgado's detention was in compliance with the provisions of article 9 (3) of the Covenant, because it was implemented in accordance with domestic legislation, was necessary and proportionate, and was considered by the courts without delay. The Government did not specifically contest the source's argument that automatic pretrial detention constitutes a breach of article 9 (3) on the exceptional nature of pretrial detention. The Government does, however, refer to a case brought before the Human Rights Committee, in which the Committee found no violation of article 9 (3), as a competent district court had determined that it was necessary

[4] According to the Human Rights Committee, a period of 48 hours is ordinarily sufficient to transport the individual and to prepare him or her for the judicial hearing; any delay longer than 48 hours must be absolutely exceptional and be justified by the circumstances. Laws in most States parties fix precise time limits, sometimes shorter than 48 hours, and these limits should also not be exceeded. See general comment No. 35 (2014), para. 33.

[5] See, for example, opinion No. 66/2017, para. 64. Also see opinions Nos. 46/2017 and 45/2017.

[6] The source indicates that article 117 of the Code of Criminal Procedure of the state of Sinaloa includes extortion in a long list of serious offences for which bail should not be granted.

[7] According to the source, article 19 of the Constitution requires that the judge routinely order pretrial detention for cases of organized crime, wilful homicide, rape, kidnapping, trafficking in persons, violent crimes involving the use of weapons or explosives, as well as serious criminal offences *against national security, the free development* of the person and public health, as determined by law.

to place the accused in pretrial detention because he had been charged with a particularly serious offence.[8]

63. The Working Group is of the view that the former article 20 and the current article 19 of the Constitution violate article 9 (3) of the Covenant, which requires that pretrial detention should be an exception rather than the rule. The Working Group has reached similar conclusions in its earlier jurisprudence,[9] emphasizing that pretrial detention constitutes a grave limitation of freedom of movement, which is a fundamental and universal human right. It follows that, in the interests of justice, liberty should be recognized as a general principle or rule, and detention as an exception.[10] In addition, the Working Group underlines the principles established by the Human Rights Committee in its general comment No. 35 (2014) on liberty and security of person: "It should not be the general practice to subject defendants to pretrial detention. Detention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. The relevant factors should be specified in law and should not include vague and expansive standards such as "public security". Pretrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances. Neither should pretrial detention be ordered for a period based on the potential sentence for the crime charged, rather than on a determination of its necessity. Courts must examine whether alternatives to pretrial detention, such as bail, electronic bracelets or other conditions, would render detention unnecessary in the particular case" (para. 38).

64. Furthermore, the Working Group considers that the requirement of automatic pretrial detention deprives the detainee of his right to seek alternatives to imprisonment, such as bail, in violation of the right to be presumed innocent until proven guilty under article 11 (1) of the Universal Declaration of Human Rights and article 14 (2) of the Covenant. The imposition of automatic pretrial detention for certain offences nullifies the presumption of innocence, since persons accused of such offences are automatically detained without a balanced consideration of the restrictive measures other than deprivation of liberty that may be used as alternatives to imprisonment. The Working Group wishes to emphasize that international rules, in particular article 9 (3) of the Covenant, do not preclude the imposition of pretrial detention for serious offences. However, these rules require that such detention be only imposed after a judicial authority has conducted an individualized review of the situation in question, taking into account the rule contained in article 9 (3) of the Covenant. The Working Group notes that article 19 of the current Constitution requires that judges impose automatic pretrial detention in cases of "serious criminal offences against national security, the free development of the person and public health, as determined by law". The Working Group considers that this requirement is too broad, and contrary to the provisions of article 9 (3), to which the Human Rights Committee makes reference when stating that the relevant factors to determine whether detention pending trial is reasonable and necessary should not include vague and expansive standards such as "public security".

65. The Working Group calls on the Mexican Government to repeal this constitutional rule and the legislation that imposes automatic pretrial detention or, at least, to modify it in line with article 9 (3) of the Covenant. The decision to impose automatic pretrial detention must be left to the discretion of the judge, based on an individualized case-by-case decision. The conclusion reached by the Working Group in regard to this issue is in line with concern within the international community about the arbitrary and prolonged use of pretrial detention in Mexico and the failure to use alternatives to detention that do not involve deprivation of liberty. This concern was reflected in several of the recommendations

[8] See *Munarbek Torobekov v. Kyrgyzstan* (CCPR/C/203/D/1547/2007) para. 6 (3). However, in this case, pretrial detention was not mandatory or routinely or automatically ordered. Instead, the court conducted an individualized assessment of the necessity of detention, which included the defendant's previous conviction and the risk of his absconding if released (paras. 2 (13) and 6 (3)).

[9] See opinions Nos. 24/2015 and 57/2014.

[10] See A/HRC/19/57, paras. 48–58.

contained in the 2013 report of the Working Group on the Universal Periodic Review of Mexico.[41]

66. The Working Group considers that automatic pretrial detention deprives the judicial authority of one of its sequential functions as an independent court, i.e. to conduct an individualized case-by-case assessment of the necessity and reasonableness of detention. Owing to the impact of the constitutional rule on the independence of the judiciary in the present case, and taking note of the source's submission concerning the fact that the complaint was submitted in the state of Sinaloa because the complainant had close personal links to top officials, including contacts in the Office of the State Attorney General, the Working Group has decided to refer the present case to the Special Rapporteur on the independence of judges and lawyers.

67. The Working Group concludes that the violation of the right to a fair trial in the present case was of such gravity as to give Mr. Zaragoza Delgado's deprivation of liberty an arbitrary character, falling within category III.

Deprivation of liberty falling within category V

68. The source claims that Mr. Zaragoza Delgado has been subject to discriminatory treatment falling under category V, that is, that the constitutional provisions applied in this case prevented Mr. Zaragoza Delgado from benefitting from alternatives to detention, in violation of his right to equality before the law and non-discrimination under articles 3 and 26 of the Covenant. According to the source, there are effectively two categories of accused: those charged with offences that do not automatically require detention, who can benefit from non-custodial alternatives such as bail, and those who, like Mr. Zaragoza Delgado, are charged with criminal offences that preclude the use of such alternatives. The source argues that it was Mr. Zaragoza Delgado's status as a person accused of a certain criminal offence that prohibited the use of alternative measures to imprisonment and served as a basis for discrimination. In its reply, the Government contends that, according to the criteria applied by the Human Rights Committee, Mr. Zaragoza Delgado was not subject to any distinction, exclusion, restriction or preference which had the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise of his rights.

69. The Working Group notes that the criteria established for category V of its methods of work are not the same as those applied by the Human Rights Committee. Category V simply requires that the deprivation of liberty aims towards or can result in "ignoring the equality of human beings". The Working Group is convinced that this requirement is met in the present case, since article 20, now article 19, of the Constitution draws a distinction between persons who may apply for alternatives to imprisonment and those who may not, thereby ignoring the equality of human beings. The Working Group considers that the distinction drawn between Mr. Zaragoza Delgado and other individuals who may be charged with offences that are not subject to automatic pretrial detention was based on a "different status", which constitutes unlawful discrimination under articles 2 (1) and 26 of the Covenant. Therefore, the Working Group considers that the facts reveal a violation falling within category V.

70. The Working Group also recalls that article 26 of the Covenant not only prohibits discrimination, but also provides that all persons are equal before the law and are entitled to equal protection of the law. As recognized by the Human Rights Committee, article 26 does not merely duplicate the guarantees provided for in the Covenant, but provides in itself an autonomous right.[42] In the present case, if it had not been for the constitutional provisions, Mr. Zaragoza Delgado could have exercised his right to apply for the alternative measures to detention available to others, like anyone else, through an individual assessment of his case. As he was unable to do so, he was detained automatically. This constitutes a violation of his right to equality before the law and equal protection by the law within the meaning of article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant, and, as a result, his case falls within category II. The Working Group is of the view that category

[41] See A/HRC/25/7, paras. 148 (17), 148 (52), 148 (61), 148 (62) and 148 (64).

[42] See general comment No. 18 (1989) on non-discrimination, para. 12.

II applies to detention resulting from the exercise of one or several of the rights set forth in this category, as well as detention resulting from a person being prevented from exercising these rights, since both situations may lead to a person being arbitrarily deprived of their liberty.

Conclusions

71. The Working Group considers that Mr. Zaragoza Delgado was not awarded compensation for the arbitrary deprivation of his liberty, in violation of article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant. According to the Government, Mr. Zaragoza Delgado successfully applied for an order ("motion for release for lack of evidence") that led to his release on 14 March 2016. As a result of this order, his application for *amparo* was dismissed and Mr. Zaragoza Delgado did not receive a formal acknowledgement that his detention was arbitrary. For this reason, he is entitled to compensation. The source has credibly argued that *amparo* proceedings are ineffective, because a person's release puts an end to the proceedings and prevents a more detailed analysis of the unlawful nature of the detention. The Working Group therefore urges the Government to undertake the necessary legal reforms to establish an effective remedy for human rights violations, including arbitrary detention.

72. In addition, the Working Group wishes to express its concern with respect to the source's allegations that Mr. Zaragoza Delgado was subjected to cruel and inhuman treatment during his land and air transportation from Mexico City to the State of Sinaloa. According to the source, this included being handcuffed for more than 12 hours and subsequently held in isolation without the possibility of communicating with his family or lawyers, which would seem to constitute temporary enforced disappearance or, at least, a period of incommunicado detention. The Government denies these allegations vehemently and points out that Mr. Zaragoza Delgado did not raise this issue with the judicial authorities in Mexico. The Government also refers to a medical examination of Mr. Zaragoza Delgado conducted on his admission to the Sinaloa detention centre in which no evidence of ill-treatment was found, although it failed to provide a copy of the medical examination report. The Government also indicates that, at the time he was placed in detention at the Sinaloa centre, Mr. Zaragoza Delgado did not complain of ill-treatment by the officials who arrested him. In reply to the Government's observations, the source asserts that there was no effective mechanism for seeking protection against ill-treatment in Mexico, since the anti-torture legislation was not in force at the time of the alleged offences and, in any event, it was not feasible for Mr. Zaragoza Delgado to submit a complaint while in custody, subject to pressure and threats to his life, liberty and physical integrity. The Working Groups refers the present case for further consideration to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

73. This is one of several cases concerning arbitrary deprivation of liberty in Mexico submitted to the Working Group in the past five years.[13] The Working Group is concerned that this may reflect a systemic problem of arbitrary detention in Mexico which, if it continues, may constitute a serious violation of international law. The Working Group recalls that, under certain conditions, widespread or systemic imprisonment or other serious forms of deprivation of liberty in violation of fundamental rules of international law may constitute crimes against humanity.[14]

74. The Working Group would welcome the opportunity to conduct a visit to Mexico to work constructively with the Government in order to address its concerns relating to arbitrary deprivation of liberty. Given that a considerable time period has elapsed since its last visit to Mexico, in November 2002, the Working Group deems it an opportune moment to continue its dialogue with the Government by way of another country visit. The Working Group notes that, in March 2001, the Government extended a standing invitation to all thematic special procedures mandate holders and therefore looks forward to a positive

[13] See, for example, opinions Nos. 66/2017, 65/2017, 24/2017, 23/2017, 58/2016, 17/2016, 56/2015, 55/2015, 19/2015, 18/2015, 23/2014 and 21/2013.

[14] See, for example, opinion No. 47/2012, para. 22.

response from the Government to its requests to visit, sent in April 2015, August 2016 and, most recently, in February 2018.

75. As a current member of the Human Rights Council, it would be advisable for the Government to extend an invitation to the Working Group to conduct an official visit to Mexico. The fact that Mexico's human rights record will be subject to review during the third cycle of the universal periodic review in November 2018 also provides an opportunity for the Government to improve its cooperation with the special procedures and bring its legislation into line with international human rights law.

Disposition

76. In light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Pedro Zaragoza Delgado, being in contravention of articles 2, 7, 8, 9, 10 and 11 (1) of the Universal Declaration of Human Rights and of articles 2 (1) and (3), 9, 14 and 26 of the International Covenant on Civil and Political Rights, is arbitrary within the meaning of categories I, II, III and V.

77. The Working Group requests the Government to take the steps necessary to remedy Mr. Zaragoza Delgado's situation without delay and bring it into conformity the relevant international standards, including those set out in the Covenant and in the Universal Declaration of Human Rights.

78. The Working Group, taking into account all the circumstances of the case, considers that the appropriate remedy would be to accord Mr. Zaragoza Delgado an enforceable right to compensation and other reparations, in accordance with international law. The Working Group urges the Government to terminate the proceedings against Mr. Zaragoza Delgado immediately.

79. The Working Group takes note of the interpretive statement made by Mexico regarding article 9 (5) of the Covenant, which states that: "Under the Political Constitution of the United Mexican States and the relevant implementing legislation, every individual enjoys the guarantees relating to penal matters embodied therein, and consequently no person may be unlawfully arrested or detained. However, if by reason of false accusation or complaint any individual suffers an infringement of his basic right, he has, inter alia, under the provisions of the appropriate laws, an enforceable right to just compensation".[15] The Working Group considers that this statement provides additional grounds for compensation under the State party's legislation.

80. The Working Group urges the Government to conduct a full and independent investigation into the circumstances surrounding Mr. Zaragoza Delgado's arbitrary detention, including the allegations of cruel and inhuman treatment, and to take appropriate measures against those responsible for the violation of his rights.

81. The Working Group encourages the Government to bring its legislation, including, in particular, article 19 of the Constitution, into line with the recommendations made in the present opinion and with the obligations assumed by Mexico under international human rights law.

82. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

Follow-up procedure

83. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

[15] See *Multilateral Treaties Deposited with the Secretary General*, chap. IV (4).

(a) Whether compensation or other reparations have been made to Mr. Zaragoza Delgado;

(b) Whether an investigation has been conducted into the violation of Mr. Zaragoza Delgado's rights and, if so, the outcome of the investigation;

(c) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Mexico with its international obligations in line with the present opinion;

(d) Whether any other action has been taken to implement the present opinion.

84. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

85. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

86. The Government should disseminate the present opinion among all stakeholders through all available means.

87. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps taken.[16]

[*Adopted on 17 April 2018*]

[16] See Human Rights Council resolution 33/30, paras. 3 and 7.